Award No. 5231
Docket No. 5080
2-L&N-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman G. B. Atchison, Pensacola, Florida, was improperly denied "Holiday pay" for his birthday on January 15, 1965, and

2. Accordingly, the Louisville and Nashville Railroad should be ordered to additionally compensate him for 8 hours at pro rata rate of pay.

EMPLOYES' STATEMENT OF FACTS: Carman G. B. Atchison, hereinafter referred to as the Claimant, is employed by the Louisville and Nashville Railroad Company, hereinafter referred to as the Carrier, at Pensacola, Florida. He is regularly assigned Thurs–Saturday on the second shift, and Sunday–Monday on the third shift, with rest days of Tuesday and Wednesday.

His birthday was Friday, January 15th, which was a work day of his assigned workweek and also a day of his vacation, which was scheduled January 14 through January 25, 1965. He received vacation pay for January 15th but did not receive additional compensation for his birthday-holiday.

A time claim was filed in the Claimant's behalf for 8 hours at pro rata rate of pay account he not being compensated for his birthday-holiday and was subsequently handled with all Carrier Officials designated to handle such matters without obtaining the desired results.

The Agreement of September 1, 1943, as subsequently amended, and particularly the Agreement of May 20, 1955, as subsequently amended, is controlling.

POSITION OF EMPLOYES: Article II of the November 21, 1964 Agreement captioned "Holidays" provides in applicable part as follows:

"Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, insofar as applicable to the employes covered by this Agreement is hereby further amended by the addition of the following Section 6:

Prior decisions of the Adjustment Boards have been such it is definitely established that where an employe takes his vacation during a week in which a holiday occurs, since the holiday is considered as work day of the work week, and the employe is compensated therefor, an additional day off with pay is not justified. The fact that an employe's birthday has now entered the "holiday status" nowise alters the Vacation Agreement. Therefore, inasmuch as the employe selected a vacation period in which his birthday occurred, it being a work day of his work week, and he was compensated for 8 hours at straight time rate, nothing further is due.

Carrier submits it has shown there is no basis for the claim and respectfully requests that the claim be denied in its entirety.

All matters referred to herein have been presented, in substance, by the carrier to representatives of the employes, either in conference or correspondence.

Carrier desires opportunity to make suitable response to employes' submission, but does not desire oral hearing unless requested by the employes.

(Exhibits not reproduced.)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

January 15 is Claimant's birthday. In 1965, it occurred during his regular vacation on Friday, a work day of his assigned workweek. He received vacation pay for that January 15 but did not receive additional compensation for his birthday.

Petitioner contends that Claimant is entitled to such additional compensation under Article II, Section 6 of the November 21, 1964, Agreement. The same issue, contentions and agreement were before this Board in Docket No. 5100 when it handed down Award 5230 denying a claim substantially similar to the present claim. No valid reason is perceived for following a different course in the present case. The claim accordingly will be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of July, 1967.

LABOR MEMBERS' DISSENT TO AWARDS NUMBERS 5230, 5231, 5232, 5233

The findings in the lead case, Award No. 5230, after quoting Article II, Section 6(a), (c) and (f) state the following:

> "Article II Section 6(a) expressly provides for two separate and distinct situations. The first concerns a birthday that occurs on a work day of the employe's workweek; Claimant's case clearly comes within that category for his birthday fell on Thursday, a work day of his assigned workweek. As to the first situation, Section 6(a) stipulates that the employe will be given the day off with pay, one of the two alternatives mentioned in the first sentence of Section 6.
>
> The second situation is where an employe's birthday occurs on other than a work day of his work week; there he is entitled to 'eight hours pay at the pro rata rate of the position to which assigned, in addition to any other pay to which he is otherwise entitled for that day, if any.' From an examination of the language, punctuation and construction of Section 6(a), it is entirely clear that the clause just quoted does not apply to the first situation."

It is clear from the above that the majority failed to give proper consideration to Article II, Section 6 as a whole as the pertinent parts read as follows:

> "Subject to the qualifying requirements set forth below, effective with the calendar year 1965 each hourly, . . . rated employe shall receive on additional day off with pay, or an additional day's pay, on each employe's birthday . . .
>
> (a) . . . if an employe's birthday falls on other than a work day of the workweek of the individual employe, he shall receive eight hours' pay at the pro rata rate of the position to which assigned, in addition to any other pay to which he is otherwise entitled for that day, if any.
>
> (c) A regularly assigned employe shall qualify for the additional day off or pay in lieu thereof if compensation paid him by the carrier is credited to work days immediately preceding and following his birthday . . ."

There is was no question in these disputes as to the claimants' qualifying for the birthday pay. Therefore, they should have received one additional day off with pay, or an additional day's pay on their birthday as quoted in the first paragraph in the quoted part of (a).

The findings in Award No. 5230 read in part as follows:

> "There is no sound basis for treating a birthday that falls on a work day of the employe's assigned workweek differently than any of the seven other recognized holidays insofar as the question at issue is concerned."

The findings then go on to support this statement by referring to Presidential Emergency Boards 106, 161, 62 and 163's recommendations. But,

if you check these recommendations you will find that none of these Boards had the Birthday pay question before them; therefore, none of these have any merit to be considered in disposing of these disputes. Further, the recommendations of these Boards have no binding power insofar as the agreement as written and agreed to by the parties is concerned. The agreement is controlling in any dispute and not what an Emergency Board recommends.

In regard to a sound basis for treating a birthday that falls on a vacation day differently than the seven holidays that fall on a vacation day is the agreements themselves.

The August 21, 1954 Agreement is the one that permits the pay for the seven holidays under Article II. This same agreement in Article I, Section 3 provides that if any of these seven holidays fall on a work day of the employes' workweek, it would be considered as workday for vacation purposes. Article I, Section 3 reads as follows:

> "Section 3. When, during an employe's vacation period, any of the seven recognized holidays (New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any day which by agreement has been substituted or is observed in place of any of the seven holidays enumerated above, falls on what would be a work day of an employe's regularly assigned work week, such day shall be considered as a work day of the period for which the employe is entitled to vacation."

If the parties intended to have the birthday considered the same as one of the seven holidays when they fell on a vacation, they would have had to amend this Section to change the word "seven" to "eight" and add the "birthday holiday" to it. They did not do this, therefore, these awards are in error as they amend the rules and the Railway Labor Act does not give the Adjustment Board that power.

The parties to this same agreement knew that there were other holidays provided in some of the agreements at that time and they did not include them in with the seven. Article II, Section 4 reads as follows:

> "Provisions in existing agreements with respect to holidays in excess of seven holidays referred to in Section 1 hereof, shall continue to be applied without change."

This proves that the parties did not intend that any holiday other than the seven were to be considered in Article I, Section 3. They did not amend Article I, Section 3 of the August 21, 1954 agreement, therefore, the birthday cannot be included without the parties amending it to include same.

If you read the November 21, 1964 agreement, Article II, you will find that the parties provided for one additional day off with pay, or an additional day's pay on each employe's birthday. It also provides that if the birthday falls on one of the seven holidays, the employe can get another day off with pay. There is no such provision for the seven holidays. Therefore, the parties agreed that the birthday is different than the seven holidays.

If the employes are not on vacation when one of the seven holidays occur, they are not permitted to work and, therefore, the holiday is not a work day

for them. The same thing applies to the birthday, therefore, it is not a work day as such. Therefore, the claimants come under Article II, Section 6(a), the part quoted.

The seven holidays prior to the August 21, 1954 agreement, even though they fell on an employe's work day of his work week, were a day off without pay and that was the reason the doctrine of maintenance of take-home pay was applied to them. But the birthday was not included in this doctrine as the November 22, 1964 agreement provides an additional day's pay when the birthday falls on one of the seven holidays of the employe's rest day.

The findings in Award 5230 refer to Emergency Board reports and Second Division Awards Numbers 2277, 2302, 3477, 3518, 3557 and Third Division Awards Numbers 9640 and 9641. These all deal with the seven holidays and all were before the agreement of November 21, 1964. Therefore they do not apply to these disputes.

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